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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–1488

ROGERS C. B. MORTON,
SECRETARY OF INTERIOR,
Appellant,

v.

STATE OF NEW MEXICO, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

BRIEF OF AMICUS CURIAE NEVADA STATE BOARD OF AGRICULTURE

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OPINION BELOW

The opinion of the District Court is not yet reported and appears as Appendix A in the Appellant's Jurisdictional Statement.

JURISDICTION

The jurisdiction of this Court was invoked by the Appellant under 28 U.S.C. 1252 and 1253 and is not questioned by this Amicus.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article IV, Section 3, Clause 2, of the United States Constitution (the "Property Clause") provides in part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

2. Amendment X, of the United States Constitution (the reserved "Police Powers") provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

3. The Wild Free-Roaming Horses and Burros Act, 85 Stat. 649–651, 16 U.S.C. (Supp. III) 1331–1340, enacted December 15, 1971, is reproduced in Appendix F of the Appellant's Jurisdictional Statement.

4. Act of Congress enabling the People of the State of Nevada to Form a Constitution and State Government, 13 Stat. 30–32 (1864), provides in part:

> That the inhabitants of that portion of the territory of Nevada included in the boundaries hereinafter designated be, and they are hereby, authorized to form for themselves, out of said territory, a state government, with the name aforesaid, which said state, when formed, shall be admitted into the Union upon an equal footing with the original states, in all respects whatsoever.

CONSENT

The Board of Agriculture being a statutory board of the State of Nevada sponsored by the Attorney General of Nevada permissibly appears with the consent of the Appellees pursuant to Rule 42(4) of the Supreme Court Rules.

INTEREST OF AMICUS CURIAE

The State Board of Agriculture is a statutory board of the State of Nevada, created pursuant to Nevada Revised Statutes (NRS) 561.045, with the express duties of keeping informed and advising the Governor and Legislature on agricultural and livestock matters affecting Nevada, and to formulate policy for the State Department of Agriculture, NRS 561.105. Such a public charge includes, as the governing body of the State Department of Agriculture, management and enforcement of Nevada's estray laws, NRS Chapter 569, and diseased animal laws, NRS Chapter 571.

The Board of Agriculture is made up of members appointed by the Governor, NRS 561.045, all of which are to be actively engaged in agriculture, NRS 561.055.

Having the trust and charge of the people on all areas of agriculture, livestock and range management within the State of Nevada, the Board of Agriculture has a deep interest in having the Appellees' position affirmed. At stake is the local control and sovereignty of Nevada in dealing with local problems affecting her agriculture and livestock production, a large segment of Nevada's economy, as well as the State's wildlife. Any position less than total affirmation of the court below could cast serious aspersions on this Amicus' authority to continue serving Nevada by carrying out its statutory duties on the vast majority of lands within the State and would deal a damaging blow to the economy of the State. Nevada, being composed of 86% federally owned land, is second only to Alaska in such a percentage of federal ownership.

Hence the outcome of this litigation is of extreme importance to the State of Nevada and its State Board of Agriculture.

STATEMENT OF THE CASE

This Amicus Curiae adopts the Statement of the Case made by the Appellees.

QUESTION PRESENTED

Whether a Three-Judge Federal District Court correctly held the Wild Free-Roaming Horses and Burros Act unconstitutional as exceeding the power of Congress to protect federal lands and as infringing on the "Police Powers" reserved to the states.

ARGUMENT

THE WILD FREE-ROAMING HORSES AND BURROS ACT IS UNCONSTITUTIONAL, EXCEEDING THE POWER OF CONGRESS TO PROTECT FEDERAL LANDS AND INFRINGING ON THE "POLICE POWERS" RESERVED TO THE STATES.

In arguing for the constitutionality of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. (Supp. III) 1331–1340, Appellant relies primarily on the "Property Clause" of the Federal Constitution:

> The Congress shall have Power to dispose and make all needful Rules and Regulations respecting the Territory or or other *Property belonging to the United States;* and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State. U.S. Const., Art. IV, Section 3, Clause 2. (Emphasis added)

Appellant believes that the authority conferred by this language

on the United States with respect to the public lands of the United States somehow gives the federal government authority to regulate and protect wild animals which happen to be on said lands while historically the regulation and protection of wild animals has been considered by the law to be within the special province of the states.

An excellent short summary of the law of wild animals appears in *Geer v. Connecticut*, 161 U.S. 519 (1896) at 527–528:

> The practice of the government of England from the earliest time to the present has put into execution the authority to control and regulate the taking of game.
> Undoubtedly, this attribute of government to control the taking of animals *ferae naturae*, which was thus recognized and enforced by the common law of England, was vested in the colonial governments, where not denied by their charters or in conflict with grants of the royal prerogative. It is also certain that the power which the colonies thus possessed passed to the states with the separation from the mother country and remains with them at the present day, insofar as its exercise is not incompatible with, or restrained by, the rights conveyed to the federal government by the Constitution.

This being the legal framework around which the Constitution was drafted and finally approved by the original thirteen states, it is inconceivable to think the framers intended the "Property Clause" to work a transfer to the federal government of a power clearly resting in the various states vis-a-vis wild animals without more precise language than that appearing in Article IV, Section 3, Clause 2 of the Constitution.

When the union of states occurred and for many decades thereafter, wild game of all types served as a source of food and other items of necessity. This Amicus believes the various states, which history has recorded as being extremely jealous of their powers and cautious in their attitude towards the new central government,

would not surrender their sovereignty rights in animals *ferae naturae* in the manner now suggested by Appellant.

Recognition of the paramount interests of the states in such animals has been given by this Court and the lower federal courts on numerous occasions. For instance, in *Lacoste v. Department of Conservation*, 263 U.S. 545 (1924), the common law rights of the states were described at page 549 as follows:

> The wild animals within its borders are, so far as capable of ownership, *owned by the state in its sovereign capacity*, for the common benefit of all people. (Emphasis added)

And in recent years this court reiterated its long standing position on this matter in the case of *Toomer v. Witsell*, 334 U.S. 385 (1948):

> A state may care for its own [resources] in utilizing the bounties of nature within her border, because it has technical ownership of such bounties or, when ownership is in no one, because the state may for the common good exercise all the authority that technical ownership ordinarily confers. When the Constitution was adopted, such, no doubt, was the common understanding regarding the power of states over its fisheries, and it is this common understanding that was reflected in *McCready v. Virginia*, 94 U.S. 391, 24 L.Ed. 248. The McCready case is not an isolated decision to be looked at askance. It is the symbol of one of the weightiest doctrines in our law. It expressed the momentum of legal history that preceeded it, and around it in turn has clustered a voluminous body of rulings. Not only has a host of state cases applied the McCready doctrine as to the power of the states to control their game and fisheries for the benefit of their own citizens * * *. Concurring opinion of Justice Frankfurter, supra, 408–409.

It is noteworthy that the above position has never been repudiated by this Court and many state and federal decisions continue to apply these doctrines in appropriate cases.

Appellant in his Brief on the Merits has rather cavalierly ignored the actual language of the "Property Clause" which refers to "Property belonging to the United States". See Appellant's Brief of the Secretary of the Interior, page 15, footnote 17.

This Amicus believes the above quoted language is of great importance in the decision of the matter now before this Court, and it further believes this language must be taken to mean just what it says, i.e. the property over which this section of the Constitution confers legislative authority on the Congress is only that property which properly belongs to the United States.

The phrase "belonging to" has been judicially defined as connoting title or ownership or other substantial proprietary interest. *People v. Couch*, 77 Ill.App.2d 290, 222 N.E.2d 46 (1966); *Wells v. Ward*, 207 S.W.2d 698 (Tex.Civ.App. 1948); *Hackett v. California Laundry*, 7 Cal.App.2d 757, 45 P.2d 833 (1935).

The United States can legally claim no title or ownership rights in the wild horses and burros which are included in the Act here under review. On the contrary, as this Court stated in *Toomer*, supra, wild animals so far as capable of ownership are owned by the states in their sovereign capacity. This was so at the formation of the Union and it remains so today.

Cases cited by Appellant, such as *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), for the proposition that Congress' powers under the "Property Clause" extend to "what the land contain(s)" have no application to animals which merely roam upon federal land. Such presence does not convert these animals into public land or other federal property, nor does it make of them products of public land.

Lower federal courts have for years recognized that the federal government must have a true property interest in a thing before the "Property Clause" may be called into question. In *United States*

v. Brown, 384 F.Supp. 1151 (E.D. Mich. 1974), the District Court at 1157 stated the rule to be:

> * * * for the property clause to be properly invoked as a basis for congressional enactment, some *actual and substantial property interest* of the federal government must be involved. (Emphasis added)

See also *United States v. Kambeitz*, 256 F. 247 (N.D.N.Y. 1919); affirmed 262 F. 378 (2nd Cir. 1919).

And finally the case of *Alabama v. Texas*, 347 U.S. 272 (1954) implies a congressional power over public property arises due to a proprietary interest in the property in question.

Lacking any title in or ownership or proprietary rights to wild horses and burros there is no "Property belonging to the United States" over which the "Property Clause" in the Constitution can confer any legislative jurisdiction to the Congress for enactment of the Wild Free-Roaming Horses and Burros Act.

Appellant has cited *Missouri v. Holland*, 252 U.S. 416 (1920) and *United States v. California*, 332 U.S. 19 (1947) as alleged authorities for the proposition that the federal government has paramount authority over all types of wildlife which happen to be found on the public domain, even though it does not own the animals themselves or have a proprietary interest in them. Each of these cases, however, is clearly distinguishable from the one presently before this Court and as such offers no real support for Appellant's position.

Missouri v. Holland, supra, did not even involve the "Property Clause", but instead arose under and was decided solely on the treaty making powers of the federal government. In addition, the wild birds involved in that particular case were highly transitory, moving within a matter of a few hours or days between states and even between nations, thus creating a problem which was national

and even international in scope. None of these elements is present in the case now before the Court.

As for *United States v. California*, supra, the decision therein turned on the fact that the right being claimed by the State of California was not one acquired from the mother country and retained by the original states, which contrasts sharply with the situation present in this case and the settled doctrine expressed in *Geer v. Connecticut*, supra.

In short, there is no basis in law for Appellant's position that the "Property Clause" of the Constitution confers authority on Congress to enact a law like the Wild Free-Roaming Horses and Burros Act. The District Court in New Mexico properly saw that this was indeed the situation; this Court must do no less. Otherwise, the continued legitimacy of dozens of state fish and game laws, estray laws, and diseased animal laws of all the 50 states will be put in considerable doubt, laws enacted and enforced over the years as the result of a body of law extending back several centuries. In this our Bicentennial Year, this Court should be particularly careful to insure that due recognition is extended to the powers belonging to the states.

CONCLUSION

Amendment X to the federal Constitution was adopted to insure that the states and/or the people reserved to themselves any and all powers not given to the federal government. The powers retained by the original states are the same powers which Nevada, the 36th State, may enjoy. This point is merely emphasized by the provisions of the enabling act for creation of the State of Nevada, 13 Stat. 30–32 (1864) which provides that Nevada "* * * shall be admitted into the Union upon an equal footing with the original states, in all respects whatsoever." Should any of the powers of

Nevada or New Mexico or their sister states be eliminated with respect to the control of estrays, diseased animals, fish and game and range management through the sanctioning of legislation such as the Wild Free-Roaming Horses and Burros Act, state sovereignty will necessarily be put in question.

Respectfully submitted,

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SPO, Carson City, Nevada, 1975